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In The

Supreme Court of the United States

October Term, 1980

No.

UNITED STATES OF AMERICA ex rel. DAVID FRANK GOLDBERG,

Petitioner,

vs.

WARDEN. ALLENWOOD FEDERAL PRISON CAMP, MONTGOMERY, PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner David Frank Goldberg respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 9, 1980.

QUESTIONS PRESENTED

1. Whether the terms of a plea agreement entered into between the government prosecutor and the accused supersede the limited discretionary powers conferred by statute upon the United States Parole Commission and thus are binding on the Parole Commission.

2. Whether the Parole Commission, by considering dismissed and unproven allegations in setting parole guidelines violates the inmate's presumption of innocence.

PARTIES TO PROCEEDING

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, appears in the Appendix herein at pages 1a-14a. The opinion rendered by the District Court for the Middle District of Pennsylvania granting petitioner's application for habeas corpus relief to the extent of directing the United States Parole Commission to conduct a new parole hearing appears in the Appendix hereto at pages 15a-22a.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1980. The jurisdiction of this Court to review the judgment rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§4202:

There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

§4203:

(a) The Commission shall meet at least quarterly, and by majority vote shall —

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

(2) create such regions as are necessary to carry out the provisions of

this chapter, but in no event less than five; and

(3) ratify, revise, or deny any request for regular, supplemental, or deficiency appropriations, prior to the submission of the requests to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to —

(1) grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole;

(3) modify or revoke an order paroling any eligible prisoner; and

(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of and assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads.

(c) The Commission, by majority vote, and pursuant to rules and regulations —

(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpenas for witnesses or evidence in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners;

(3) may delegate authority to conduct hearings held pursuant to section 4214 to any officer or employee of the executive or judical branch of Federal or State government; and

(4) may review, or may delegate to the National Appeals Board the power to review, any decision made pursuant to subparagraph (1) of this subsection except that any such decision so reviewed must be reaffirmed, modified or reversed within thirty days of the date the decision is rendered, and, in case of such review,

the individual to whom the decision applies shall be informed in writing of the Commission's actions with respect thereto and the reasons for such actions.

(d) Except as otherwise provided by law, any action taken by the Commission pursuant to subsection (a) of this section shall be taken by a majority vote of all individuals currently holding office as members of the Commission which shall maintain and make available for public inspection a record of the final vote of each member on statements of policy and interpretations adopted by it. In so acting, each Commissioner shall have equal responsibility and authority, shall have full access to all information relating to the performance of such duties and responsibilities, and shall have one vote.

§4206:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines

promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided,* That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

§4207:

> In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:
>
> (1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;
>
> (3) presentence investigation reports;
>
> (4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and
>
> (5) reports of physical, mental, or psychiatric examination of the offender.
>
> There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

STATEMENT OF THE CASE

A. Preliminary Statement

At stake on this appeal is whether the government can be trusted to honor commitments it makes to persons accused of crimes. In this regard this petition raises two related issues. The first is whether the United States Parole Commission is bound

to commitments made by another related agency of the government, the Justice Department, that are contained in a plea agreement. Closely related to this question is whether the Parole Commission can itself, quite apart from the terms of any plea agreement, consider in fixing parole eligibility guidelines information contained in courts of an indictment that have been dismissed with prejudice.

Each issue strikes at the heart of the criminal justice system and raises profound questions. One is the extent that the prosecutor's office can legitimately make representations to an accused during the course of plea negotiations about the duration of his sentence, and the obligation, if any, that the Parole Commission has to honor those promises. The other issue involves the scope of the Parole Commission's authority to fix guidelines and whether in so doing the Commission has either usurped, or erroneously been permitted to acquire, powers best restricted to the judiciary, and thereby obliterated the presumption of innocence doctrine. Only granting the writ now and later reversing the decision below can ensure resolution of these issues.

Petitioner's argument is essentially a simple one. Petitioner entered into a plea agreement with the United States Department of Justice dismissing with prejudice all counts of an indictment against him pertaining to the sale of meat to the United States Department of Defense in exchange for his plea of guilty to a one count information charging him with violation of 18 U.S.C. §1001 (*i.e.* concealment of a material fact). Petitioner was given the impression that the counts of the indictment, having been dismissed with prejudice, ceased to exist. He was therefore shocked when those counts were resurrected by the Parole Commission and used to justify his being given excessively high parole eligibility guidelines. Not only did the Parole Commission's consideration of those indictment counts violate the spirit, as well as the terms of the plea agreement, but it emasculated the presumption of innocence to which petitioner was entitled.

B. The District Court Decision

On June 28, 1979, the district court accepted petitioner's reasoning and granted in part his petition for a writ of habeas corpus to the extent of ordering the Parole Commission to hold a new hearing for him. The district court noted that:

> In this case, for whatever reason, the United States Attorney concluded that there was no reason to proceed with the dismissed counts of the indictment and consequently agreed to their dismissal with prejudice so that the Government would be forever barred from pressing them in a prosecution (20a).

As a result,

> It is the view of the Court that it is not proper for the parole commission to consider as an aggravating circumstance, see, 28 C.F.R. §2.20(d), counts of an indictment which have been dismissed with prejudice and for which there is no reliable evidence on the record. (20a-21a).

A new parole hearing was therefore ordered to be conducted within thirty days of June 28, 1979 at which

> Goldberg's request for parole will be reconsidered and in which his offense severity will be recalculated and based solely on the count of the indictment to which he pled guilty. (21a).

C. The Court of Appeals Decision

The court of appeals, however, disagreed with the district court's reasoning, choosing instead to sanction the Parole

Commission's practice of considering dismissed counts of an indictment and the facts surrounding them in setting parole eligibility guidelines. In so doing, the court of appeals rejected petitioner's argument that sought to compel the Parole Commission to honor the plea agreement that he reached with the government. Moreover, the court of appeals gave no weight to the presumption of petitioner's innocence, a presumption jeopardized by the Commission giving consideration to the dismissed indictment counts.

Instead, the court of appeals based its decision on the powers granted to the Parole Commission by the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201-4218 (1976). In particular, the court of appeals relied upon Section 4207 that permits the Parole Commission to consider presentence investigation reports in determining its parole eligibility guidelines. The court of appeals coupled its reliance on this statutory authorization with a narrow interpretation of the meaning to be afforded the dismissal with prejudice of the counts of the indictment against petitioner, to conclude that the Parole Commission is entitled to consider such counts in fixing parole guidelines.*

In accepting without question the scope of authority seemingly conferred by statute upon the Parole Commission, the court of appeals ignored the crucial question of whether such statutorily delegated authority violated, as applied, a basic tenet of American justice — the presumption of innocence. Similarly, the court of appeals neglected to consider the ramifications that its blanket approval of the Parole Commission's actions will have upon the ability of government prosecutors to honestly make representations during the course of plea negotiations to accused persons as to their prospective sentences.

* Since the court of appeals remained unclear as to what commitments the government may have made to petitioner, as part of the plea bargain, the court of appeals remanded to the district court for further proceedings to clarify this issue. If, however, no further factual issues are found, the court of appeals instructed the district court to dismiss petitioner's habeas corpus petition.

REASONS FOR GRANTING THE WRIT

This case is important because it raises a basic issue involving the administration of justice that needs to be resolved now. As a result of the court of appeals decision a doubt now exists whether the government can be trusted to honor commitments that it makes to individual citizens. Concomitant with this doubt is a question as to the future legitimacy of the plea bargaining process. In essence, the government's integrity is on trial.

In addition, the decision of the court of appeals evidences an ominous deference to the increasing encroachment by the Parole Commission upon functions once reserved to the judiciary, as well as a disturbing acquiescence in the deleterious effects upon the presumption of innocence that have resulted from such encroachment.

The consequences of allowing the opinion below to stand are unacceptable, not only to petitioner, but to the basic aims of American criminal justice. If unreviewed the decision below will in all likelihood influence the future course of the criminal justice system. If unreviewed, the increasing aggrandizement of judicial power by the Parole Commission will be deemed sanctioned. If unreviewed, the efficacy of plea agreements will be cast in doubt, as the government prosecutor's promises will be considered hollow ones having no force and effect on the Parole Commission. Review by this Court can avoid these harmful consequences, while reaffirming the government's integrity and the presumption that every man is innocent until proven guilty.

I.

The court of appeals has erroneously permitted Parole Commission's discretionary powers to supersede plea agreement.

The court of appeals, unlike the district court, failed to discern that the government, in the guise of the Parole Commission, should be bound to commitments made by it in its role as the Justice Department and that are contained in a plea agreement. Pursuant to such an agreement entered into between the government and petitioner counts of an indictment against petitioner were dismissed with prejudice. It was improper for the Parole Commission to have considered those counts in deciding petitioner's parole eligibility, for what could be more prejudicial than for the government to deny parole on the basis of allegations dismissed "with prejudice"?

The fact that the United States Attorney's Office, not the Parole Commission, entered into the plea agreement with petitioner does not relieve the government of its obligation to honor that agreement.

> A citizen has the right to expect fair dealing from his government, see *Vitarelli v. Seaton*, 359 U.S. 535, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities.

S & E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972).

Nowhere is the government's duty to deal fairly with its citizens more evident than in the realm of criminal law.

> When the United States prosecutes an individual the prosecution may take place in the person of the counsel trying the case on behalf of the government, but the government

> encompasses more than just the prosecutor. The United States — the whole — is represented by the prosecution.

Calley v. Callaway, 382 F. Supp. 650, 701 (M.D. Ga. 1974), *rev'd on other grounds*, 519 F. 2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also, Giglio v. United States*, 405 U.S. 150, 154 (1972) ("the prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed . . . to the Government.").

It follows from the reasoning of these cases that the Parole Commission, an agency within the Department of Justice (18 U.S.C. §4202), is bound by the promises made by attorneys within that Department. Since attorneys for the Justice Department in prosecuting cases do so as representatives of the country as a whole, and any representations and promises that they make "must be attributed to the Government," it defies all logic for the Parole Commission, a government agency within the Justice Department, to claim immunity from any obligations assumed by attorneys within that Department. Yet this is exactly the position taken by the Parole Commission (and sanctioned by the court of appeals in this case) when it failed to honor the government's commitment to dismiss with prejudice the indictment counts against petitioner, but instead used those counts in the most prejudicial manner imaginable — to deny petitioner his rightful parole eligibility guidelines.

The staff of the Justice Department, whether attached to the Office of the United States Attorney or to the Parole Commission, "have the burden of 'letting the left hand know what the right hand is doing' or has done." *Santabello v. New York*, 404 U.S. 257, 262 (1971). Petitioner is not responsible, nor should he be made to suffer, for the failure of the United States Attorney's Office to consult with the Parole Commission prior to the government entering into the plea agreement with him.

Nor was petitioner obligated to obtain policy statements from every branch of the government concerning how each would interpret the terms of the plea agreement. To impose such an obligation on petitioner would debase the entire plea bargaining process, "an essential component of the administration of justice." *Id.* at 260. No incentive would exist for an accused party to accept a plea of guilty to a charge in exchange for certain representations made to him by the prosecutor if these representations could be dishonored by any of numerous subdivisions of the government.

For the government to provide its citizens the "fair dealing" that they deserve, the government must be treated "as a unit, rather than as an amalgam of separate entities." It is this basic tenet of civics that the court of appeals rejected when it held the Parole Commission not bound to the promises which the United States Attorney's Office had made to petitioner and therefore permitted it to consider, in determining petitioner's parole eligibility guidelines, the counts of the indictment against him which had been dismissed with prejudice.

II.

The court of appeals has sanctioned infringement upon presumption of innocence by permitting Parole Commission to fix parole eligibility guidelines based upon dismissed and unproven allegations.

The court of appeals acquiesced in the encroachment of the Parole Commission upon the sovereignty of the judiciary by tolerating the Commission's consideration of the counts of the indictment against petitioner that had been dismissed with prejudice in setting parole eligibility guidelines. In so doing the court of appeals failed to realize that the Commission, lacking the safeguards which attach to a judicial proceeding, cannot be given the same flexibility in considering information not submitted into evidence in a court of law for the purpose of

setting parole eligibility guidelines as a court enjoys in fixing sentences. The Parole Commission is not a judicial body, and this fact must be stressed lest the Commission mutate into an inquisitorial organ oblivious to legal safeguards.

It has been recognized as being almost axiomatic that

> the [Parole] Commission lacks the institutional safeguards of either the courts or the Congress: it has neither judicial independence and allegiances to the ideal of dispassionate and reasoned decisions nor legislative responsiveness to the popular will.

Geraghty v. United States Parole Commission, 589 F. 2d 238, 259 (3d Cir. 1978), *vacated on other grounds,* 48 U.S.L.W. 4297 (U.S. Mar. 19, 1980). Indeed there is no authorization in the Parole Commission and Reorganization Act, 18 U.S.C. §4201 *et seq.,* (1976) for the Commission to assume judicial (or legislative) functions. Lacking judicial powers (and attendant safeguards) it is inconceivable that the Parole Commission is necessarily entitled to consider in setting parole eligibility guidelines all the information available to the courts in fixing sentences. Yet that is precisely the position taken by the Parole Commission and approved by the court of appeals.

Moreover, by allowing the Parole Commission to consider the dismissed counts of the indictment against him the court of appeals took an anachronistic stance that trivializes and, in reality, obliterates the presumption of innocence, a tenet that has been termed "a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams,* 425 U.S. 501, 503 (1976).

In a case remarkably similar to this one, a district court relied on the presumption of innocence doctrine to hold that the Parole Commission denied an inmate due process by placing

emphasis upon a count to which the prisoner did not plead guilty. In *Pernetti v. United States,* 21 Crim. L. Rep. 2033 (D.N.J. Mar. 3, 1977), the court concluded that

> . . . if, as a result of a dismissal, the defendant is not subject to a judgment of conviction or an imposition of sentence because none of the allegations has been proven or admitted to, the parole board should not be allowed to base any parole eligibility determinations on the unproven allegations contained in the counts dismissed.

Yet, inexplicably, the court of appeals ignored the issue of the presumption of innocence when it rendered its decision. This despite the fact that "the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States,* 156 U.S. 432, 453 (1895).

The insensitivity of the court of appeals to the public policy represented by the presumption of innocence raises an important reason for this Court to hear this appeal.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. KORNSTEIN
Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2215

UNITED STATES OF AMERICA, ex rel.
DAVID FRANK GOLDBERG, *Appellee*

v.

WARDEN, ALLENWOOD FEDERAL PRISON
CAMP, MONTGOMERY PENNSYLVANIA, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-0244)

Argued March 20, 1980

Before: SEITZ, *Chief Judge*, WEIS and HIGGINBOTHAM,
Circuit Judges.

(Filed June 9, 1980)

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

As a result of a plea bargain, the prosecution dismissed certain counts of an indictment "with prejudice." Petitioner contends that as a consequence of that phraseology, the Parole Commission could not consider the conduct underlying those counts in deciding whether to grant parole on a related charge to which petitioner pleaded guilty. The district court adopted the petitioner's position, but we reject it and, consequently, vacate the

order directing the Commission to conduct a new parole hearing. Because the petitioner may be relying upon other commitments made as part of the plea bargain, however, we remand for clarification of that issue.

Petitioner sought a writ of habeas corpus under 28 U.S.C. §2241 in the district court alleging that the United States Parole Commission had improperly denied him release. The district court dismissed several of the claims but found meritorious the contention that in reaching its decision the Commission had improperly considered counts of an indictment that had been dismissed "with prejudice." The court directed the Commission to hold a new hearing, at which time only the charge to which petitioner had pleaded was to be evaluated.

Petitioner was indicted along with several others and charged with participating in a scheme to defraud the United States by delivering meat that did not meet contract specifications. After negotiations between his trial counsel and the government, it was agreed that petitioner would plead guilty to one count of an information charging a violation of 18 U.S.C. §1001 (1976), concealment of a material fact. In return the government agreed "not to allocute for any particular sentence" but specifically reserved "its right to comment on the evidence against this defendant." In addition, the government was to "forego seeking any additional charges against said defendant in connection with his conduct in supplying meat to the Department of Defense, and at the time of sentencing will dismiss the counts in the indictment . . . with prejudice."[1] The agreement did not mention parole.

---

1. The plea agreement was prepared on paper bearing petitioner's trial counsel's letterhead in the margin, and we assume from that fact that the draftsmanship was that of petitioner's lawyer.

Opinion

The petitioner pleaded guilty in the United States District Court for the District of Massachusetts to the one-count information. Before sentence was imposed, counsel acknowledged to the court that he had gone over the presentence report with petitioner, and said that there were no matters included that he wished to challenge. The presentence report, in the section captioned "Official Version," noted that petitioner had pleaded guilty to a one-count information and described the scheme to supply the Department of Defense with inferior meat. The names of the other six participants were listed, along with a description of their roles in the affair, which included bribery of government inspectors. According to auditors quoted in the report, the government had been defrauded of "at least $1,468,951." Finally, the report contained a notation by the probation officer:

> "Offense Severity Moderate
>
> Parole Prognosis
>
> If defendant is committed, he will serve between 12 and 16 months according to the U.S. Parole Commission Guidelines."

Petitioner received a prison term of four years and a $10,000 fine. All counts in the indictment pertaining to the petitioner were dismissed.

On May 4, 1978, after four months of imprisonment, the petitioner was given his initial parole hearing. The hearing examiner panel believed that the offense should be classified as "Greatest I" severity under parole guidelines promulgated by the Commission, 28 C.F.R. §2.20 (1979), *as amended by* 45 Fed. Reg. 6379 (1980), because the government had been defrauded of a sum in excess of $500,000. Such a rating under the guidelines, when combined with the other factors, "would indicate a range of 40-55 months."[2]

---

2. Under the guidelines, crimes are assigned a severity rating and placed into one of seven categories. Each prisoner is assigned a

Because the presentence report predicted a shorter incarceration period, the matter was referred to the Regional Commissioner for determination whether the sentencing court felt that "this case had guidelines of 12-16 months." In response to an inquiry from the Parole Commission, an Assistant United States Attorney in Massachusetts wrote that at the time of sentencing the court did not mention the time the petitioner would likely serve in prison. The letter went on to say that petitioner had requested a reduction in sentence in early May, but that on May 19, 1978, the court had declined to alter its judgment. Thereafter, the hearing examiners and the Regional Commissioner agreed to continue the petitioner to the expiration of his sentence.

In February 1979 the National Appeals Board of the Parole Commission advanced the parole date because of the consideration given to a codefendant and told petitioner he would be eligible for release on March 19, 1980. At the same time, petitioner sought a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, the area where he was then confined.

The habeas petition sought either an outright vacation or a reduction of the sentence, and, alternatively, a furlough so that petitioner could return to his family. Among the grounds for relief were that the Parole Commission, in considering information concerning the dismissed counts in the indictment, had breached the plea agreement, and that petitioner's health was in danger of irreparable harm because of the inadequate care available in prison.

The district court rejected the request for a reduction of sentence because of lack of jurisdiction and also refused the furlough request. The court found that de-

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parole prognosis score on a scale of 0 to 11. The intersection of these two factors yields the anticipated time to be served in prison. 28 C.F.R. §2.20 (1979), *as amended by* 45 Fed. Reg. 6979 (1980).

spite the petitioner's allegation that he was simply a less culpable member of the scheme, the Parole Commission's denial of parole was not arbitrary or capricious; failure to exhaust administrative remedies precluded consideration of the claim of improper medical care.

The district court concluded, however, that it was "not proper for the parole commission to consider as an aggravating circumstance, *see* 28 C.F.R. §2.20(d), counts of an indictment which have been dismissed with prejudice and for which there is no reliable evidence on the record." The Commission was directed to conduct a new hearing at which time petitioner's offense severity rating would be recalculated solely on the basis of the count to which he had pleaded guilty. Petitioner was later enlarged pending this appeal.[3]

In this court, the Parole Commission argues that it has broad discretion to consider the nature and circumstances of the offense and that matters apart from the count to which a plea is entered may be relevant to a parole determination. The petitioner renews his contention that the Parole Commission's consideration of counts dismissed with prejudice violated the plea agreement.

The district court did not determine whether there had been a plea agreement on parole, but took the closely related position that since the counts in the indictment had been dismissed "with prejudice," the Commission should not have considered them. The court recognized that a sentencing court could properly consider evidence of crimes of which the defendant had

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3. The petitioner has been enlarged since September 1979, months in advance of his parole date of March 20, 1980. The case, therefore, is not moot since he could be ordered to return in order to serve the remainder of his sentence. In view of our decision vacating the district court's order and remanding for possible further findings, we note that counsel for the Commission commented at oral argument that the petitioner will not be reincarcerated until his case has been reevaluated by the Commission.

been acquitted, *e.g., United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972), but distinguished that situation because there the sentencing judge had heard the testimony.[4]

We must measure the district court's reasoning against the powers granted to the Commission by the Parole Commission and Reorganization Act of 1976 (PCRA), 18 U.S.C. §§4201-4218 (1976). Section 4203 gives the Commission the power to grant or deny parole and to promulgate rules and regulations establishing guidelines necessary to carry out the national parole policy. The general criteria for making parole determinations are found in §4206, which provides that eligible prisoners may be released on parole if "the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines that . . . release would not depreciate the seriousness of his offense or promote disrespect for the law" and "would not jeopardize the public welfare." *Id.* §4206(a)(1), (2). Section 4207 lists the material that the Commission may consider:

> "(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;
>
> (2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

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4. There is considerable doubt that the Parole Commission, in fact, ever did review the dismissed counts of the indictment. The documents in the record suggest that the Commission received its information about the petitioner's offense only from the presentence report. The one-count information is also in the record, but we do not find the original indictment or any evidence that it was ever in the possession of the Commission. The government chose to defend the case on an *arguendo* basis, assuming that the petitioner's allegations were correct but denying their legal efficacy. Thus, we must meet the issues as addressed by the district court.

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender."

The section concludes that "such additional relevant information . . . as may be reasonably available" may also be reviewed by the Commission.

It is clear that the Commission is granted wide discretion to review material that would be helpful in its determination whether to release a prisoner on parole, a decision the Supreme Court has acknowledged is difficult. It is a "subtle [one which] depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 10 (1979). The choice "involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others, and undermine respect for the administration of justice." *Id.* at 8 (footnote omitted).

The scope of information that the Parole Commission may consider, though perhaps statutorily not as expansive as that applicable to the sentencing judge, is nevertheless quite broad. The statute applicable to the sentencing court, 18 U.S.C. §3577 (1976), places no limitation on information that may be received "concerning the background, character, and conduct" of the convicted defendant. We have held, for example, that under

this statute a sentencing judge may properly consider allegations in a pending, untried indictment. *United States v. Metz*, 470 F.2d 1140 (3d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *see United States v. Garcia*, 544 F.2d 681, 684 (3d Cir. 1976).

In the parole context, Congress has authorized the Commission to view presentence reports, 18 U.S.C. §4207(3) (1976), despite the knowledge that "[t]here are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged." *Gregg v. United States*, 394 U.S. 489, 492 (1969). Thus, in *Billiteri v. United States Board of Parole*, 541 F.2d 938, 944 (2d Cir. 1976), a pre-PCRA case, the court reasoned that if the sentencing judge may take into account offenses other than the one for which defendant was convicted, the Parole Board may use a presentence report to arrive at a severity rating. Similarly, in *Zannino v. Arnold*, 531 F.2d 687 (3d Cir. 1976), another pre-PCRA case, we held that reports linking a prisoner to large-scale organized criminal activity provided a sufficient basis for a Board determination to deny parole. Nothing in the new Act or its legislative history, curtails what could have been considered by the old Parole Board.[5]

In fact, the PCRA emphasizes consideration of the nature and circumstances of the offense. Before enactment of the Act, House and Senate conferees reconciled conflicts between the House and Senate bills. In their report, the conferees stated that it was their intent that the Commission review and consider both the nature

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5. By regulation, the Commission has provided that it "shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., at subsequent admission or other clear indication of guilt.)" 28 C.F.R. §2.19(c) (1979).

and circumstances of the offense, and that in making each parole decision, the Commission should recognize and determine the relative severity of the prospective parolee's offense. In so doing, the Commission "shall be cognizant of the public perception of and respect for the law." H. Conf. Rep. No. 838, 94th Cong., 2d Sess. 25, *reprinted in* [1976] U.S. CODE & AD. NEWS 358. This inquiry was made explicit in the statute itself. 18 U.S.C. §4206. It is against this background, therefore, that we must decide if the Commission improperly considered the dismissed counts.

In its opinion, the district court emphasized that the counts were dismissed "with prejudice." The plea agreement, however, did not in any way link this phrase to the question of parole, nor did it restrict the scope of the presentence report. On these matters the agreement was completely silent. Even at time of sentencing, after the presentence report had been examined by defense counsel, there was no request or suggestion that because these counts were dismissed with prejudice the report should not be reviewed by the Parole Commission.

We find nothing in the record to establish that the "with prejudice" language was to have any effect on the scope of the presentence investigation or, more specifically, prohibit its disclosure to the Parole Commission. In this report, as we noted earlier, the details of the scheme and the amount of money allegedly involved are included. It is this information that apparently is also contained in the dismissed counts of the indictment or is the conduct to which they refer.

Petitioner seems to take the position that without any clarifying language, the use of "with prejudice" is understood to require that those counts, and the conduct to which they refer, be treated as if they had never existed. But the petitioner has not demonstrated that such a restrictive interpretation is common in plea bargaining.

In negotiating for a plea, the defendant has a very real interest in limiting the number of counts to which he is exposed for the obvious reason that the total length of time to which he can be sentenced is reduced. It would be of little benefit to him if those same counts could be included in a new indictment, and so it is generally understood that if on a plea bargain charges are dismissed, they will not be revived. Should the government reinstitute the counts in a new indictment, the defendant could invoke the agreement as a defense under *Santobello v. New York*, 404 U.S. 257 (1971). Accordingly, the common understanding is that in the absence of contrary expression, counts dismissed as a result of plea bargaining are "with prejudice."

In this case, the addition of the phrase added nothing but certainty to the terms of the plea bargain and insured that the petitioner would not again be charged with the same crime. The clause did no more than express what would otherwise have been implied. Nothing in the terminology suggests that it has any ramifications that would affect parole consideration or that would restrict the presentence report. Nor do the parties cite any decisional law to that effect. We conclude that, standing alone, the phrase "with prejudice" does not bar comment in the presentence report about the charges in the dismissed counts and does not prevent consideration of that conduct by the Parole Commission in weighing all the factors bearing on the nature of the offense and the prisoner's character as well.[6] Inasmuch as it relied solely

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6. The one count information to which petitioner pleaded charged him with covering up that he had misrepresented the quality of meat that he was supplying to the government and that he was making regular cash payments to government inspectors who were to inspect his company's production. The extent of the fraud being "covered up" and the amount of cash given to the inspectors obviously would have a bearing on the severity rating attributable to the offense charged in the information.

on that terminology for validity, the district court's order must be vacated.

As an independent basis for relief, amicus curiae contends that the Commission's almost total reliance on the presentence report in arriving at a parole determination denied petitioner an individualized consideration. This, in turn, touches upon the concerns addressed in our decision in *Geraghty v. United States Parole Commission*, 579 F.2d 238 (3d Cir. 1978), *aff'd on other grounds*, —— U.S. ——, 48 U.S.L.W. 4296 (U.S. Mar. 19, 1980). In *Geraghty*, we suggested that a wooden application of parole guidelines to arrive at the parole determination could usurp traditional judicial control over the sentencing process.

In this case, however, there is no doubt that petitioner's parole determination took into account factors peculiar to him. The Commission took steps to insure that the sentencing judge's wishes were ascertained and complied with by forwarding an inquiry to the United States Attorney's Office in Massachusetts. Only after the response was received did the Commission set parole. This concrete example of considering factors peculiar to the particular prisoner negates any argument that petitioner received nothing more than a mechanical application of the parole guidelines. We therefore conclude that petitioner's parole determination complied with our dictates in *Geraghty*.

We also reject an alternative argument advanced by the amicus that the "arbitrary" reliance on the presentence report violated a Commission regulation requiring that parole determinations be made upon a "preponderance of the evidence." 28 C.F.R. §2.19(c) (1979). That same regulation goes on to state that "the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability." *Id.* In this regard, we think it significant that after he had been given the

opportunity to review the report, and before sentencing, petitioner did not challenge any of the factual matters included. Both the sentencing judge and the Parole Commission, therefore, were entitled to assume that the factual information in the report was correct. Conceding that in some instances an overreliance on the presentence report may hinder an impartial and a just decision, we find nothing in this record to suggest that the information received by the Commission here was inaccurate.

Because of the procedural posture of the case when it was decided by the district court, however, we are unable to resolve all the issues at this time. The petitioner has alleged that the plea bargain incorporated the government's agreement not to use the allegations of the dismissed counts in considering eligibility for parole. A failure by the government to observe a promise with respect to parole recommendations may constitute a breach of a plea bargain. *See Cohen v. United States*, 593 F.2d 766 (6th Cir. 1979). Although the plea agreement on its face does not link the dismissal to parole recommendation or consideration, the record is not clear if petitioner is raising a factual issue concerning the government's representations in addition to his interpretation of the phrase "with prejudice." If so, the matter must be resolved in the first instance by the district court. We will remand to the district court, therefore, to determine if there is an issue remaining, and, in that event, to decide the matter. If there are no further factual matters to be developed, however, the court may then dismiss the petition.

Accordingly, this case will be remanded to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ORDER OF UNITED STATES DISTRICT JUDGE MUIR DATED JUNE 28, 1979

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 79-244

Complaint Filed 2/27/79
(Judge Muir)

FILED
Williamsport, Pa.
June 28, 1979
Donald R. Berry, Clerk

UNITED STATES OF AMERICA ex rel. DAVID FRANK GOLDBERG

Plaintiff

vs.

WARDEN, ALLENWOOD FEDERAL PRISON CAMP, MONTGOMERY, PA.,

Defendant

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Goldberg filed this action pursuant to 28 U.S.C. §2241 seeking an order vacating or reducing his sentence so that it is equal to that of a co-defendant and further ordering that he be furloughed to his home in New Haven, Connecticut. On February 28, 1979, Respondents were directed to show cause within 20 days why Goldberg should not be granted habeas

corpus or mandatory injunctive relief. On March 19, 1979, Respondents were granted an additional 10 days in which to comply with the Court's order of February 28, 1979. On March 29, 1979, Respondents filed an answer to the show cause order to which Goldberg filed a reply on April 12, 1979. The Respondent filed a response to the reply of April 12, 1979 on April 17, 1979.

In his petition for a writ of habeas corpus, Goldberg contends that the parole commissioners arbitrarily and capriciously denied him parole, that correction officials have been negligent in handling his health and personal problems, and that the parole commission improperly considered dismissed counts of an indictment in denying him parole. The Court will deal with these claims *seriatim.*

The Court notes first that in his request for relief Goldberg has asked for an order vacating or reducing the sentence. If in fact that is what Goldberg actually is seeking, such a motion as argued by Respondent should have been filed with the Court that sentenced him pursuant to F.R.Crim.P. 35 or perhaps pursuant to 28 U.S.C. §2255. It is the view of the Court that because Goldberg in part challenges the offense severity rating given to his offense he may be entitled to a new parole hearing based upon a different offense severity rating pursuant to 28 U.S.C. §2241 and thus the Court will consider the merits of the petition.

The operative facts in the above-captioned case are as follows: On September 26, 1977, David Frank Goldberg pled guilty in the United States District Court for the District of Massachusetts to one count of concealment of material facts from the Department of Defense in violation of 18 U.S.C. §1001. Pursuant to a plea bargain agreement, petitioner asserts and the Respondent does not dispute that the remaining counts of the indictment were dismissed with prejudice. On January 4,

1978, Goldberg was sentenced to a four-year regular adult term of imprisonment. On May 4, 1978, Goldberg was given an initial parole hearing at the Federal Prison Camp, Eglin Air Force Base, Florida. The examining panel referred the case to the regional office for additional information concerning the sentencing court's reference to a guideline range of 12 to 16 months. On May 24, 1978, the parole commission requested further information from the United States Attorney's Office for the District of Massachusetts to clarify whether the sentencing court believed that the guideline range in Goldberg's case should be 12 to 16 months. On July 17, 1978, the United States Attorney's office responded that the sentencing court did not address the likely time of incarceration prior to parole in Goldberg's case. As a result of this letter, one examiner recommended that Goldberg be granted parole on May 31, 1979 whereas the other examiner recommended that Goldberg be continued to the expiration of his sentence. Pursuant to 28 C.F.R. §2.23(c) an administrative hearing examiner reviewed the case and recommended that Goldberg's parole be continued to expiration. The regional commissioner concurred with this recommendation and Goldberg was informed that he would be continued to expiration by notice of action dated August 16, 1978. On October 18, 1978, this decision was affirmed by the regional commissioner. However, on February 27, 1979, by notice of action, the National Appeals Board modified the decision of the regional commissioner and continued Goldberg for presumptive parole on March 19, 1980 in order to eliminate a disparity between the parole decision made by the Commission as to Goldberg and a co-defendant.

In support of his contention that the parole commission arbitrarily and capriciously denied him parole, Goldberg indicates that he has cooperated fully with the Department of Justice, that he has no prior criminal involvement, that he has paid a fine imposed by the United States District Court for the District of Massachusetts, that he will serve a longer parole than

the co-defendant Harry Goldberg who will be released in March of 1980 while he was not scheduled for release by the Regional Commission until February, 1981. On the same day that Goldberg filed his petition for a writ of habeas corpus, the national appeals board modified the decision of the Regional Commissioner and scheduled Goldberg for release on parole at the same time as his co-Defendant Harry Goldberg. In his traverse, Goldberg still asserts that the decision of the Parole Commission is arbitrary and capricious because he notes that his participation in the crime for which he was convicted was less than that of Mr. Goldberg.

It is the Court's view that there is no showing that the decision of the Parole Commission is arbitrary and capricious based on the treatment of David Goldberg and Harry Goldberg. As indicated by the hearing summary dated May 4, 1978, although David Goldberg was a passive participant in the scheme to defraud the Government and did not directly participate in bribing inspectors, he was fully knowledgable of the scheme, failed to advise law enforcement authorities, and participated in the profits resulting from the scheme. Petitioner has not challenged the information set forth in the hearing summary. It appears to the Court that there is sufficient evidence of culpability on the part of David Goldberg which justifies his equal treatment with that of Harry Goldberg. There is a rational basis on the record for the decision of the parole commission and it will not be upset by the Court on the ground that the Commission has arbitrarily and capriciously treated him in the same manner as a co-defendant. *Cf.* Zannino vs. Arnold, 531 F.2d 687 (3d Cir. 1976).

Goldberg also asserts that correction officials have not properly considered his health and personal problems and for this reason he should be granted release. In support of this contention, he points to his transfer from institution to institution, his prior medical history, his injuries resulting from a

fall from the top of a bunk bed in the Allenwood Institution, his transfer to numerous prison hospitals, and the mental and physical condition of his family. Goldberg appears to seek an order of Court directing that he be furloughed to his home in New Haven, Connecticut so that he may halt the debilitating effects his detention has had on his wife and family and also appears to seek release from confinement because of the alleged negligence of prison officials. Goldberg does not indicate why this alleged negligence, if true, requires habeas corpus relief. There is no showing based upon the information alleged in the petition that the actions of the prison officials have placed Goldberg in custody in violation of the constitutional laws or treaties of the United States. *See* 28 U.S.C. §2241(c)(3). The claim of negligence would be more properly brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.* in which damages could potentially be recovered for the alleged negligence of United States officials. However, as noted by the Respondent, Goldberg has not demonstrated that he has exhausted his available administrative remedies with regard to his claims of negligence, whether the petition is treated as one for habeas corpus relief, or for federal tort claims act relief. Such exhaustion is clearly required and as a result, in its absence, this claim will be dismissed. *See* United States ex rel. Sanders vs. Arnold, 535 F.2d 848 (3d Cir. 1976); 28 U.S.C. §2675.

Goldberg also contends that the Parole Commission improperly considered dismissed counts of an indictment in denying him parole. On the record before the Court, it appears that the petitioner pled guilty pursuant to a plea bargain agreement to one count of an indictment in exchange for the dismissal with prejudice of the remaining counts of the indictment. In reaching its decision to place Goldberg's offense behavior in the Greatest I severity category, the Commission considered the total conspiracy in which the government was apparently defrauded of in excess of $500,000. Goldberg contends that the Parole Commission improperly considered the

dismissed counts of the indictment because those counts had been dismissed with prejudice and should have been treated as if they did not exist. The Respondents argue that the Parole Commission is permitted to utilize dismissed counts as an aggravating circumstance to justify an increase in the severity rating. *See* Manos vs. United States Board of Parole, 399 F.Supp. 1103 (M.D. Pa. 1975); Lupo vs. Norton, 371 F.Supp. 156 (D. Conn. 1964); *see also* Billiteri vs. United States Board of Parole, 541 F.2d 938 (2d Cir. 1976); Bistram vs. United States Parole Board, 535 F.2d 329 (5th Cir. 1976); Foddrell vs. Sigler, 418 F.Supp. 324 (M.D. Pa. 1976). The Court is of the view that Goldberg's contention has merit. Although it is true that the cases cited by the Respondent indicate that the parole commission may consider dismissed counts of the indictment as part of the alleged offense in determining the proper offense severity rating, none of the cases cited by the Respondent appear to deal with the situation where counts of the indictment have been dismissed with prejudice. The cases cited by the Respondent merely indicate that certain counts of the indictment have been dismissed. The Court is of the view that dismissal of counts of the indictment with prejudice is similar to the situation in which the Defendant has been acquitted on certain counts of the indictment. In United States vs. Sweig, 454 F.2d 181 (2d Cir. 1972), the Court held that a sentencing judge can properly consider evidence with respect to crimes of which the Defendant had been acquitted. *See also* United States vs. Metz, 470 F.2d 1140 (3d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973). But in *Sweig,* the sentencing judge had before him evidence which had been given under oath, was subject to cross examination and the judge had the opportunity personally to observe the witnesses. In this case, for whatever reason, the United States Attorney concluded that there was no reason to proceed with the dismissed counts of the indictment and consequently agreed to their dismissal with prejudice so that the Government would be forever barred from pressing them in a prosecution. It is the view of the Court that it is not proper for the parole commission

to consider as an aggravating circumstance, *see* 28 C.F.R. §2.20(d), counts of an indictment which have been dismissed with prejudice and for which there is no reliable evidence on the record. For this reason, the writ of habeas corpus will be granted in part so that the Parole Commission will be directed to conduct within 30 days of the date of this Order a new parole hearing in which Goldberg's request for parole will be reconsidered and in which his offense severity will be recalculated and based solely on the count of the indictment to which he pled guilty.

Goldberg has also sought habeas corpus relief based on his contention that the sentencing judge erroneously believed that the applicable guidelines for the offense for which he was convicted would be 10 to 16 months. It does not appear that this claim has any merit. Documents submitted by the United States Attorney for the District of Massachusetts and uncontested by Goldberg indicate that the sentencing judge did not refer to the 10 to 16 month guideline in imposing sentence. Furthermore, the Court is not at all persuaded that such a claim of frustration of the sentencing judge's intent is cognizable in a 28 U.S.C. §2241 proceeding and clearly it is not in a 28 U.S.C. §2255 proceeding. *See* United States vs. Addonizio, ____ U.S. ____, 25 Cr.L. 3123, (June 4, 1979). Consequently, this claim will be dismissed.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The petition for a writ of habeas corpus is granted in part and denied in part.

2. Respondent shall within 30 days of the date of this Order arrange for the Parole Commission to conduct a parole hearing in the above-captioned case in which Goldberg's request for parole will be considered anew and his offense severity will be recalculated on the basis solely of the count of the indictment to which he pled guilty.

Order

3. In all other respects, the petition for writ of habeas corpus is denied.

s/ Muir
MUIR, U.S. District Judge